Supreme Court, U. S.
FILED
SEP 19 1980
MICHAEL RODAK, JR., CLERK

No. 80-279

IN THE

Supreme Court of the United States

October Term, 1980

RIEGEL TEXTILE CORPORATION,

Petitioner,

vs.

LEE ANN GRYC, by her mother and natural guardian, JACQUELYN GRYC, and JACQUELYN GRYC, individually,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

BRIEF OF RESPONDENTS IN OPPOSITION

WEBSTER, BALDWIN & WILLIAMS
RICHARD BALDWIN
530 Minnesota Building
Saint Paul, Minnesota 55101
(612-222-7477)
Attorneys for Respondents

JOHN F. COOK
JAMES R. TSCHIDA
Of Counsel

224-7631 — Review Publishing Co., 287 E. 6th St., St. Paul, Minn. 55101 — 224-7631

TABLE OF CONTENTS

	Page
Argument	2
Introduction	2
1. The Award In This Matter Does Not Raise Any Substantial Or Important Federal Issues.	4
2. The Flammable Fabrics Act Does Not Preempt The Minnesota Court's Ability To Protect The Safety Of Its Citizens.	8
3. The Jury Was Instructed That It Should Consider The Results Of The CS191-53 Test Together With All The Evidence In Determining Whether The Fabric Produced By Petitioner Riegel Was Defective And Unreasonably Dangerous.	10
Conclusion	11

TABLE OF AUTHORITIES

Page

Statutes:

United States Statutes:

15 U.S.C. 2051 8

State Statutes:

Minn. Stat. 549.20 5

Cases:

Bellotte v. Zayre Corp., 531 F.2d 1100 (1st Cir., 1976) 4

Bexiga v. Havir Mfg. Corp., 60 N.J. 42, 290 A.2d 281 (1972) 7

Gillham v. Admiral Corp., 523 F.2d 102 (6th Cir., 1975) cert. den. 424 U.S. 913 (1976) ... 5

Griffith v. Planters Chemical Corp., 302 F. Supp. 937 (D.S.C. 1969) 7

Howard v. McCrory, 601 F.2d 133 (1979) 2

Incollingo v. Ewing, 44 Pa. 263, 282 A.2d 206 (1971) 7

Lagorga v. Kruger Co., 275 F.Supp. 373 (W.D. Pa., 1967), aff'd. 407 F.2d 671 (3rd Cir., 1969) 4

Linn v. United Plant Board Workers, 383 U.S. 53 (1956) 9

Nowland v. Shoe Corp. of Amer., 47 F.R.D. 6 (D.Del., 1969) 7

Raymond v. Riegel Textile Corp., 484 F.2d 1025 (1st Cir., 1973) 4, 7

Rinker v. Ford Motor Co., 567 S.W.2d 655 (Mo. Ct. App., 1978) 5

Sherman v. M. Lowenstein & Sons, Inc., 28 App. Div. 2d 922, 282 N.Y. Supp. 2d 142 (1967) 4, 7

Page

Simien v. S. S. Kresge Co., 556 P.2d 551 (5th Cir., 1978) 4

Sturm Rugger & Co. v. Day, 594 P.2d 38 (Alaska, 1979) 5

Toole v. Richardson-Merrell, Inc., 256 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967) 5, 6

UAW v. Russell, 356 U.S. 634 (1958) 9

U.S. v. Regan, 232 U.S. 37 (1914) 6

Secondary Authorities:

Dressed to Kill: The Flammable Fabrics Act of 1953—Twenty Years in Retrospect. 4 Cumberland Sanford L. Rev. 358 (1976) 5

Elkind "The War Against Flammable Fabrics—Punitive Damages: Consumer's Atomic Age Weapon", 3 Trial 42 (April-May 1972) 5

Note: Flammable Fabrics Act Protection: Fire Resistants v. Industry Resistance, 39 Geo. Wash. L. Rev. 608 (1971) 2, 5

Note: The Human Torch—An Exegis About the Clothes We Wear, 23 SC L. Rev. 787 (1971) 5

Philo, "Lawyer Desk Reference §8; 13 (Vol. 1, P. 546) (1979) 9

Rheingold, The Expanding Liability of the Product Supplier: A Primer, 2 Hofstra L. Rev. 521 (1974) . 6

Swartz, Product Liability: The Torch Cases, 76 Case and Comment 3 (Jan.-Feb., 1971) 5

Uniform Product Liability Act, 44 Fed. Reg. 62714, 1979 5

IN THE

Supreme Court of the United States

October Term, 1980

No. 80-279

RIEGEL TEXTILE CORPORATION,

Petitioner,

vs.

LEE ANN GRYC, by her mother and natural guardian, JACQUELYN GRYC, and JACQUELYN GRYC, individually,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

BRIEF OF RESPONDENTS IN OPPOSITION

ARGUMENT

INTRODUCTION

Four year old LeeAnn Gryc was severely injured on December 8, 1969 when her pajama top instantaneously burst into flame when it came in contact with an electric burner on the kitchen stove and LeeAnn was immediately engulfed in flames. The fabric in her pajamas, cotton flannelette, manufactured by petitioner Riegel, passed the minimal flammability standard set by the Flammable Fabrics Act of 1953, CS191-53. Although this fabric passed the CS191-53 standard, the evidence showed that almost everything passed CS191-53. It was shown at trial that not only did newspaper pass the CS191-53 test,[1] but that the test declared newspaper 48 percent safer than was minimally necessary for flammability protection for use in a known hazard, children's sleepwear.[2] Testing also showed that there was no significant flammability difference between LeeAnn's pajamas and those fashioned out of newspaper.

It is generally recognized by courts and commentators that the source of the CS191-53 standard is the textile industry itself. In 1960, petitioner Riegel's vice president noted that a textile organization had "guided the government" towards the flammability standard which was "not only practical for the textile industry but which gave the maximum necessary protection to the American public."[3] Expert testimony showed

---

[1] Other courts have also noted that newspaper passes CS191-53. *Howard v. McCrory*, 601 F.2d 133 (1979).

[2] Sleepwear generally is more loose fitting and billowy than other clothing and thus is more likely to come into contact with a common household source of ignition. Riegel's personnel testified that children, because of their innocence and inexperience, were more likely to be ignited than adults.

[3] Trial Exhibit AC. See also Note: *Flammable Fabrics Act Protection: Fire Resistants v. Industry Resistance*, 39 Geo. Wash. L. Rev. 608 (1971).

that fabric in LeeAnn's pajama burst into flames instantaneously on contact with a similar burner. Compensatory damages were awarded against petitioner Riegel for the following reasons:

1. The defective and unreasonably dangerous flammability characteristics of the fabric.
2. Chemical flame retardants were available to Riegel for many years and were not applied to this fabric.
3. The fabric could have been made out of inherently flame retardant synthetic fibers, but was not.
4. Warnings concerning this cotton flannelette's flammability could have been passed through the stream of commerce, but were not.
5. Instructions concerning a simple home method of temporarily flame retarding the fabric could have been given, but were not.

Punitive damages were awarded because of petitioner's complete knowledge that there were many children who were being severely injured or killed during those times by unreasonably dangerous cotton flannelette sleepwear. Riegel also knew that paper passed the CS191-53 test.[4] Despite petitioner's knowledge it intransigently refused to do anything to reduce the hazard either by way of product improvement, or warnings, or instructions. In 1956, in a memorandum entitled "Flammability-Liability", Riegel's vice president referred to the "powder keg" that Riegel was sitting on because of the flammability of its flannelette.[5] Despite this powder keg, the evidence showed that Riegel's research department spent only minimal amounts in studying various alternatives which would have reduced the extreme flammability hazard, as

[4] Trial Exhibit AN.
[5] Trial Exhibit AO.

petitioner kept these alternatives under "surveillance" until safer fabrics were mandated by law.[6] The Minnesota Supreme Court found "sufficient, in fact substantial, evidence for the jury to find that Riegel acted in a willful, wanton and/or malicious disregard of the rights of others in marketing its flannelette."[7]

1. THE AWARD IN THIS MATTER DOES NOT RAISE ANY SUBSTANTIAL OR IMPORTANT FEDERAL ISSUES.

Citing no authority, petitioner asserts that Congress preempted the ability of the judiciary to make common law tort awards of both compensatory and punitive damages to victims of clothing fires, which fires were caused by explosive fabric such as cotton flannelette.

As to the award of compensatory damages, petitioner makes no further argument, despite the fact that their position flies directly in the face of all case law. Every court that has considered the issue has held that the Flammable Fabrics Act sets a minimal safety standard and, in the proper case, courts and juries should be allowed to make awards of compensatory damages to an injured clothing fire victim, even though the fabric involved passed the CS191-53 test. *Raymond v. Riegel Textile Corp.*, 484 F.2d 1025 (1st Cir., 1973); *Lagorga v. Kruger Co.*, 275 F.Supp. 373 (W.D.Pa., 1967), aff'd 407 F.2d 671 (3rd Cir., 1969); *Sherman v. M. Lowenstein & Sons, Inc.*, 28 App.Div.2d 922, 282 N.Y.Supp.2d 142 (1967); *Bellotte v. Zayre Corp.*, 531 F.2d 1100 (1st Cir., 1976). Even *Simien v. S.S. Kresge Co.*, 556 F.2d 551 (5th Cir., 1978), which involves an adult male throwing gasoline on a fire and the ignition of a nylon fabric which subsequent

[6] Trial Exhibit DA.
[7] A-28.

experimentation showed was almost impossible to ignite, does not alter this rule of law.

The commentators agree that the existence of a minimal federal flammability standard does not prohibit a jury from making any common law tort award. See *Elkind "The War Against Flammable Fabrics—Punitive Damages: Consumer's Atomic Age Weapon"* 3 Trial 42 (April-May, 1967); *"Dressed to Kill: The Flammable Fabrics Act of 1953—Twenty Years in Retrospect"* 4 Cumberland-Sandford L. Rev. 358 (1976); Note: *"Flammable Fabrics Act Protection: Fire Resistants v. Industry Resistance,"* 39 Geo. Wash. L. Rev. 608 (1971); Note: *"The Human Torch—An Exegis About the Clothes We Wear,"* 23 S.C. L. Rev. 787 (1971); Swartz, *"Product Liability: The Torch Cases,"* 76 Case and Comment 3 (January-February, 1971).

The only thing unique about this case is that it involves an award of punitive damages against a textile manufacturer. The law of punitive damages in product liability litigation is evolving as society recognizes the need for these types of damages to balance the interest of responsible manufacturers, irresponsible manufacturers, and consumers. The need for the ability to impose punitive damage award against certain manufacturers is being recognized by juries, courts,[8] legislatures,[9] commentators[10] and the United States Department of Commerce.[11]

---

[8] *Gillham v. Admiral Corp.*, 523 F.2d 102 (6th Cir., 1975), Cert. Den. 424 U.S. 913 (1976); *Sturm, Rugger & Co. v. Day*, 594 P.2d 38 (Alaska, 1979); *Rinker v. Ford Motor Co.*, 567 S.W.2d 655 (Mo. Ct. App., 1978); *Toole v. Richardson-Merrell, Inc.*, 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967).

[9] Minn. Stat. 549.20.

[10] Owen, Punitive Damages in Product Liability Litigation, 74 Mich. L. Rev. 1253 (1976).

[11] Uniform Product Liability Act, §120, 44 Fed. Reg. 62748 (1979).

No court, commentator or legislative body has ever seriously thought that a punitive damage award in a product liability setting creates an undue burden on Interstate Commerce. Further, the imposition of common law civil penalties is not violative of the due process clause. *Toole v. Richardson-Merrell, Inc.*, 251 Cal.App.2d 689, 60 Cal. Rptr. 398 (1967); *U.S. v. Regan*, 232 U.S. 37 (1914). It is a common law obligation not to be wantonly indifferent to serious injuries or the means to reduce those injuries.

The Department of Commerce, in drafting the Uniform Product Liability Act, at Section 108,[12] recognized that a claimant may prevail in product liability litigation where existing legislative or administrative standards do not meet an appropriate level of safety. Further, at Section 120[13] it was recognized that punitive damages may be imposed when the harm suffered was the result of a product seller's reckless disregard for the safety of those who may be harmed by the product. There is no provision in the punitive damage section for any exemption from common law liability for punitive damages because of the mere existence of a minimal federal safety standard. It is well-settled law that the existence of a federal "safety" standard does not insulate a manufacturer from common law tort liability. The law is best summarized in Rheingold, *"The Expanding Liability of the Product Supplier: A Primer,"* 2 Hofstra L.Rev. 521, 557 (1974):

> "It would be improper to allow compliance with any law or the fact of explicit government approval, to cause the issue of whether defendant was negligent or otherwise liable to be removed from the consideration of the

[12] 44 Fed. Reg. 62730 (1979).
[13] 44 Fed. Reg. 62748 (1979).

jury. To do so is to confuse the jury's role with the purpose of governmental oversight. The latter sets a minimum acceptable standard, whereas the former is whatever the common law says it is. Such standards as those set under the Flammable Fabrics Act have shown that the community (jurors) standard can and should be set much higher than whatever it is that the industry is able to work out in a behind-the-doors setting with bureaucracy.[14] There is also a question as to whether defendant is offering anything more than self-serving proof when he offers to show that he complied with private standards which he himself helped to promulgate."

The punitive damage award in this case does not create a state regulation of what fabrics may be produced or sold in the State of Minnesota. Rather it reflects necessary punishment and hopeful deterrence of a manufacturer's indifference to the injuries its products were causing. Riegel grossly breached its common law duty to a little girl by using CS191-53 as an excuse for not making product improvements or giving warnings or instructions, all in the face of what it knew was a great public health hazard. No substantial federal question exists in this case.

---

[14] Citing *Raymond v. Riegel*, 484 F.2d 1025 (1st Cir., 1973) (Flammable Fabrics Act); *Griffith v. Planters Chemical Corp.*, 302 F.Supp. 937 (P.S.C., 1969) (F. Pesticide Reg.); *Nowland v. Shoe Corp. of America*, 47 FRD. 6 (D. of Del., 1969) (ASA Standard for Ladders); *Bexiga v. Havir Mfg. Corp.*, 60 N.J. 42, 290 A2d 281 (1972) (Industrial Standards); *Sherman v. M. Lowenstein & Sons, Inc.*, 28 App. Div. 2d 922, 282 N.Y.Supp. 2d 142 (1967) (Flammable Fabrics Act); *Incollingo v. Ewing*, 44 Pa. 263, 282 A2d 206 (1971).

2. THE FLAMMABLE FABRICS ACT DOES NOT PREEMPT THE MINNESOTA COURT'S ABILITY TO PROTECT THE SAFETY OF ITS CITIZENS.

The Minnesota Court, in its decision, thoroughly and completely examined the question of whether the preemption provision of the Flammable Fabrics Act and Supremacy Clause of the United States Constitution prohibited the imposition of punitive damages on a defendant who has complied with the Act. It concluded that those provisions did not prohibit the imposition of punitive damages. The Minnesota Court's analysis of this issue is logical, sound and complete and needs no further supplementation from this Court. For this reason it is unnecessary for this Court to expand upon the Minnesota decision.

The Minnesota Court noted that the 1967 preemption provision preempted all inconsistent state laws without explaining which type of state actions were preempted. The Minnesota Court then noted that the 1976 amendment clarified this ambiguity by replacing the term "law" with the term flammability "standard or regulation". Thus, it was clear that Congress only intended to preclude inconsistent state statutory law which sought to establish specific regulations. Congress therefore did not expressly preempt common law remedies.

The Minnesota Court further found that Congress did not implicitly preempt any common law remedies. In addition, the Minnesota Court looked to the Consumer Products Safety Act, 15 U.S.C. 2051 et seq. to determine congressional intent. This Act presently is applicable to flammable fabrics. Section 2074A of the Act, entitled "Private Remedies", states as follows:

> Compliance with consumer products safety rules or other rules or orders under this chapter shall not relieve any person from liability at common law or state statutory law to any other person.

There are sound policy reasons why the Consumer Products Safety Act allows an injured consumer to make claim for compensatory damages, and, in an appropriate case, for punitive damages. There are literally millions of products being manufactured and consumed in the United States each year. Government cannot take the full responsibility to determine which of these products may be hazardous and which are not. Government cannot take the responsibility to determine which manufacturers are acting responsibly and which are acting in wanton indifference to product safety.[15] That duty traditionally and appropriately is a function of the common law.

Finally, the Minnesota Court recognized that this Court has held on numerous occasions that states have a vital interest in protecting their citizens from injury, and accordingly, only a clear expression of congressional intent deprives the state of its inherent power to make awards of compensatory and punitive damages. *U.A.W. v. Russell*, 356 U.S. 634 (1958); *Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966).

The State of Minnesota has a vital interest in seeing that injured victims, such as LeeAnn Gryc, are compensated. It also has a vital interest in protecting all of its citizens by encouraging manufacturers, such as petitioner Riegel, to ac-

---

[15] It has been noted that the Consumer Product Safety Commission has only 125 inspectors for all the products in the United States. It is intended that private attorneys seek out a manufacturers common law liability for its products. Product reliability comes from product liability. Philo, "*Lawyers Desk Reference* §8:13" (Vol. 1, P. 546 (1979)).

cept the responsibility which flows from the power of its position, and in discouraging the marketing of products which it knows to be highly dangerous. This encouragement takes the form of punitive damages.

There is no inconsistency between the Federal purposes behind the setting of a minimum flammable fabric standard in 1953 and the state court purposes in acting to protect the safety of its citizens through a jury award in 1978.

3. THE JURY WAS INSTRUCTED THAT IT SHOULD CONSIDER THE RESULTS OF THE CS191-53 TEST TOGETHER WITH ALL THE EVIDENCE IN DETERMINING WHETHER THE FABRIC PRODUCED BY PETITIONER RIEGEL WAS DEFECTIVE AND UNREASONABLY DANGEROUS.

The instruction concerning the effect to be given the CS191-53 standard was complete and proper. The jury was aware that LeeAnn's pajama top ignited instantaneously upon contact with a common household source of ignition, and that CS191-53 declared newspaper to be 48 percent safer than was really necessary for fabric in children's sleepwear. The instruction was proper and the evidence overwhelming that CS191-53 was of no assistance in determining the relative flammability hazard presented in children's sleepwear.

The Minnesota Court did not declare CS191-53 invalid in the legal sense of declaring the Federal act and regulations to have no further legal effect in the State of Minnesota. Rather, CS191-53 was declared invalid in a factual sense in that it was found by the jury that the test in no way accurately predicted the relative flammability hazard of cotton flannelette pajamas for a four year old girl. Obviously, CS191-53 declared newspaper to be substantially safer than was necessary for a known hazard, children's sleepwear.

4. CONCLUSION.

Of all the reported cases, the evidence in this case established most completely the rationale behind the growing body of law imposing punitive damages against some manufacturers for their misconduct. Petitioner Riegel interprets the Flammable Fabrics Act in a way that would give it license to commit the most heinous manufacturing misconduct, to willfully manufacture a hazardous product knowing and ignoring the means to reduce the hazard. The Minnesota Court completely and logically analyzed why that license should not be granted. There is no reason why this Court should find any substantial federal question involved in the State Court's imposition of common law remedies.

Respectfully submitted,

WEBSTER, BALDWIN &
WILLIAMS
BY: RICHARD BALDWIN
Attorneys for Respondents
530 Minnesota Building
Saint Paul, Minnesota 55101
(612-222-7477)

OF COUNSEL:
JOHN F. COOK, Esq.
JAMES R. TSCHIDA, Esq.